SUPREME COURT, U. S.
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MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF FOR PETITIONER, NATURAL GAS PIPELINE COMPANY OF AMERICA.

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REPLY BRIEF FOR PETITIONER, NATURAL GAS PIPELINE COMPANY OF AMERICA.

Natural Gas Pipeline Company of America (Natural) submits this reply brief in further support of its writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case and in answer to the briefs in opposition of Transcontinental Gas Pipe Line Corporation (Transco), The Public Service Commission of the State of New York (NYPSC) and Associated Gas Distributors (AGD).

SUMMARY OF ARGUMENT.

Respondents' major arguments in support of the Court of Appeals are: (1) that the Commission, by honoring Natural's contract with the producers in the context of a Commission-approved settlement, improperly deferred to private rights rather than the public interest; and (2) that the remand was proper because the Commission totally ignored the comparative need factor. Both arguments are without merit.

Natural contracted for the supplies in question many years in advance. The settlement bargain by which Natural was to get the gas was approved by the Commission in a proceeding in which Transco intervened. That settlement also assured Transco that it would continue to receive its contract quantity unimpaired by allocation or other regulatory action. Transco, having long since received its contractual share of the gas—and two years more—now seeks to clothe itself in the robes of the public interest in order to take from Natural gas to which Natural is entitled *not simply under a private contract but also under a Commission-approved settlement.* To permit continuation of such a diversion and such intermeddling by one pipeline in the affairs of another cannot possibly be in the public interest, particularly when Natural will deliver the gas in the regulated interstate market to Midwest customers greatly in need of the gas.

The Court of Appeals substituted its judgment that comparative need is nearly absolute for the Commission's judgment that where need is not a decisive factor, the bargain struck in a Commission-approved settlement should be effectuated. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 344 (1956); *Texas Gas Transmission Corp.* v. *F. P. C.*, 441 F. 2d 1392, 1394 (6th Cir. 1971). The indecisive nature of the need factor is clearly revealed by an analysis of the Examiner's findings. In this context, the Commission's

decision, which emphasized the long-term effects on service stability and proper supply management rather than the transitory effects of a disposition based on an insignificant need differential, fully implemented the public interest.

ARGUMENT.

A. The Court Substituted Its Judgment for That of the Commission.

Respondents attempt to characterize the opinion of the Court of Appeals as a rather innocuous remand to the Commission to consider factors ignored in the proceedings below. AGD, for example, states that the Court determined the Commission "erred in focusing exclusively upon the contractual rights to the La Gloria Field gas supply" and further states that the Commission's decision was "completely devoid of any consideration of the need of Transco and its customers for the gas." (Br., p. 3). Transco suggests that the "whole thrust" of the Court of Appeals' opinion was to direct the Commission's attention to "any and all relevant public interest factors" and that the Court "made no attempt to tell the Commission how much weight" to accord the comparative need factor. (Br., p. 8). See also NYPSC Br., p. 2.

Despite Respondents' protests to the contrary, the Court of Appeals ruled that "primary importance" (Pet., p. A10) must be given to comparative need and refused to accept the Commission's evaluation of the public interest. This is not a case where the Commission ignored a public interest factor. Rather, it is a case where the Commission considered all aspects of the public interest and, in the context of a particular fact situation, found the policy of effectuating the settlement outweighed an indecisive "need" factor—only to have the Court of Appeals overturn that judgment. Therefore, the cases cited by Transco (Br., p. 9)—and much of the argument of Transco and AGD—is simply inapposite.

B. The Commission Adequately Considered Comparative Need.

Close reading of the Commission's Opinion No. 655 reveals that the factor of comparative need was not ignored. Rather, the Commission merely regarded it as indecisive under the particular circumstances.

As Transco (Br., p. 14) and AGD (Br., p. 8) point out, the Commission did not make a finding on which pipeline has greater need. In the view the Commission took of the case and a view Natural supports, both here and below (see Transco Br., p. 14), the Commission was not required to measure need on a finely calibrated scale.[1] There was a necessity to examine the record to determine whether the difference in need, if any, was sufficient to outweigh other factors being balanced in the scales of public convenience and necessity. The Commission did examine the record on need. (Pet., p. A26).[2] It observed two pipelines, both in great need of gas, and concluded that the need factor is not decisive (Pet., p. A27).

As observed by the Court of Appeals, recognition by the Commission that both pipelines need gas is not a finding of equal need. (App. A, p. A8). However, neither is it an indication that the Commission overlooked the factor of need. Failure to acknowledge this fact shows that the Court of Appeals was rendering the comparative need factor almost an absolute standard—a decision totally in conflict with the broad-based statutory public convenience and necessity standard—and was unwilling to accord the Commission the flexibility required in the balancing of all factors.

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1. The fact that the Examiner's findings were undisturbed (AGD Br., p. 2; NYPSC Br., p. 9; Transco Br., p. 5) is without significance, since the Commission disapproved the Examiner's entire approach to need.

2. Citations to Pet., p. A....., are to the Appendix to the Petition for Certiorari.

The Examiner's findings relied on so heavily by Transco (Br., p. 13) and AGD (Br., pp. 8-9) are relevant at this point—not to assess comparative need, the precise determination of which was not necessary to the Commission's decision—but to evaluate in a general way the sort of "need" background and context in which the Commission's Opinion No. 655 was promulgated. While Natural believes certain of these findings on Transco's greater curtailment were inaccurate and would have been expressly overturned had the Commission found it necessary to make a precise "need" determination, Natural also believes they reveal enough about comparative need fully to support the Commission's decision not to rely upon need as the decisive factor.

The Examiner's most important finding for purposes of the Commission's decision is that none of the distribution companies that presented evidence was in "imminent danger of being unable to provide service to existing customers" (App. B, p. B 7).[3] Therefore, the real question is not at all whether existing residential customers in New York will go short of gas rather than similar customers in Chicago. Rather, it is whether New York or Chicago will have additional gas for use in making interruptible sales, developing additional storage to protect winter heating loads, and serving additional customers.

With respect to this type of service, the Examiner's findings indicate the rapid growth in the residential market in the market area of Natural's customers, as Northern Illinois Gas Company alone added 45,000 residential customers in 1971 (App. B, p. B 1).[4] Another major customer, The Peoples Gas Light

3. For the convenience of the Court, certain of the Examiner's findings and discussion relevant to the need issue are excerpted as Appendix B hereto.

4. The Examiner drew the conclusion that Transco's customers are restricting service more severely. In fact, as the record makes clear, Transco's market area is quite static, whereas, Natural's is growing rapidly, particularly in the residential sector. Transco's distribution company customers are static in growth and have only a minor waiting list when compared to Natural's customers (App. B, pp. B1-B5).

and Coke Company, is faced with an extensive waiting list of residential customers. (App. B, p. B 3-B 4).

In addition, the Examiner emphasized stongly that it is Natural and its customers which are developing storage which enables them to limit interruptible sales (App. B, p. B 1-3) and that Transco has been quite remiss in this regard. (App. B, p. B 8-B 10).

In light of Natural's great need for gas to serve new residential customers, the greater ability and willingness of Natural and its customers to utilize gas to develop storage rather than to continue interruptible sales and the lack of any real threat to service to firm customers, it is hardly surprising[5] that the Examiner's other findings on Transco's curtailment did not appeal to the Commission as a sound basis for decision—even if the Commission had accepted them—when other important factors were present.[6]

C. The Commission, in Honoring the Settlement, Furthered the Public Interest.

Respondents intimate that, because the Commission relied upon a policy of effectuating a settlement comprised, *inter alia,* of a private contract, the Commission is somehow forsaking *public* interest in favor of a *mere private* interest. See Transco

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5. *F. C. C.* v. *Allentown Broadcasting Corp.*, 349 U. S. 358 (1955) is applicable in this situation. No party even attempted to undermine the basic administrative law holding of that case—that where comparative factors the Commission is required to consider are indecisive, the Commission may base its decision on other policy consideration rather than measuring the comparative factor precisely.

6. AGD also digs up the tired old red herring that the Commission improperly considered the certificate question prior to the abandonment question (Br., p. 5). Of course, the Commission considered certification first, as the only logical procedure to insure that gas would not be lost to the interstate market. But this determination in no way prejudiced the abandonment decision (Pet., p. A20).

Br., p. 16. However, the Commission expressly determined, prior to effectuating the settlement, that "(t)he bargain, when made, was in the public interest and it is no less so today." (Pet., p. A25.)

NYPSC relied (Br., p. 6) upon the following statement of the Court of Appeals:

> At bottom, the Commission's decision stands for the simple proposition that where all parties need contested gas supplies, the party having a contractual right to such gas will prevail. (App. A, p. A8)

There are at least two major fallacies in this statement and in the "private rights" argument of Respondents. First, the Commission in Opinion No. 655 was effectuating rights under a *Commission-approved settlement*[7]*—not simply* under a *private contract,* as Transco continually (and inacurately) represents (Br., pp. 11-12). Second, the Commission's expressions about need must be read in the context of the situation of the two pipelines (discussed in Section B above) and not in the abstract. The Commission clearly indicates in Opinion No. 655 that, when faced with convincing proof of significant differences in relative need, it would reach a different result. (Pet., pp. A26-A27).

The greatest shortcoming of the opinion of the Court of Appeals, as indicated in this quotation, however, is its failure to realize that the Commission's Opinion No. 655 was not a "simple proposition" at all and that public, as well as private, considerations were involved. The dispute over deliveries from the La Gloria Field has a long and complex procedural history,

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7. NYPSC also questions the interpretation of the settlement (Br., p. 4). However, the sense of the settlement has been interpreted by the Commission as including a recognition of Natural's right to receive the gas now being delivered to Transco. (Pet., p. A24). The Court of Appeals apparently acquiesced in this reading of the settlement when it acknowledged that the settlement should be accorded "significant weight." Transco, probably realizing this, "quibbled" with the Court's phrase (Br., p. 16). See NYPSC Br., p. 8.

a history in which Transco participated.[8] (Pet., pp. A22-A24). That history, culminated initially in the 1958 settlement. For many years, Natural accepted the detriments of this settlement. Now, when its benefits have come due, Natural's customers are to be deprived of those benefits by Transco, major beneficiary of the settlement to date.[9]

NYPSC speaks (Br., p. 8) of the Commission in Opinion No. 655 "giving paramouncy to private contracts over the public interest", and Transco also stresses this alleged dichotomy (Br., p. 16). Aside from the fact that once again the Commission's role in the initial settlement is ignored, this formulation also evades the fact that the Commission never purported to speak other than in the public interest (Pet., p. A25) and that *private arrangements and their recognition may serve the public interest,* especially when formulated under the Commission's watchful eye and with knowledge that the Commission must be satisfied.[10]

Even the enforcement of purely private contractual relationships has a public interest beyond the narrow private interests involved. This Court has made clear that such contracts are not lightly to be set aside. See *United Gas Pipe Line Co.* v.

8. The fact that Transco was not signatory to the settlement (composed *inter alia* of a contract amendment between Natural and the producers) is irrelevant (see NYPSC Br., p. 4), as Transco had an opportunity, as intervenor to the proceeding, to object to the settlement prior to its approval by the Commission.

9. It is ironic for Transco to speak of the "predatory" practices of others (Br., p. 16) when it has benefited from the 1958 settlement for some 15 years and now seeks to cut off the benefits to Natural and its customers, thus disrupting the settled expectations of pipelines and consumers. Absent the settlement, allocation of deliveries from the La Gloria Field might have been necessary, resulting in reduced deliveries to both Transco and Natural.

10. It is not true that the *Michigan Consolidated* case somehow shackled the Commission by establishing "the basic criteria for considering abandonment applications where the seller's aim is to shift service to a new purchaser." (NYPSC Br., p. 10.) The Court merely approved the Commission's application of a comparative need test in the particular circumstances of that case—circumstances which did not include a Commission-approved settlement. Indeed, the Court ultimately remanded, *inter alia,* for failure to give consideration to a proposal by certain of the parties of a settlement.

Mobile Gas Service Corp., 350 U. S. 332, 344 (1956) which sets forth very clearly that the "stability of supply arrangements . . . is essential to the health of the natural gas industry." Here, however, there was far more. The enforcement of this contract was in the context of a Commission-approved settlement which resolved a dispute over deliveries and was designed to insure stability in pipeline-producer relationships for the remainder of the La Gloria Field's productive history. See *Texas Gas Transmission Corp.* v. *F. P. C.*, 441 F. 2d 1392 (6th Cir. 1971) in which the Court stated of settlement agreements:

> Such agreements bind both parties—the Commission and the regulated entity—and thus allow both to avoid the delays and uncertainties of litigation. (441 F. 2d at 1394.)

It is the Respondents, rather than the Commission who are "mesmerized" (AGD Br., p. 3) by the narrow, short-term concept of the public interest to the exclusion of other factors. The La Gloria Field gas represents a prized supplement to the short-term gas supply of either pipeline in these times of shortage. However, it would be folly to ignore the long-term effects of the Commission's decision. Pipelines continue to be the unit for implementing service to the ultimate consumers. Planning and operation require that, once private contractual arrangements receive the Commission's initial blessing, these pipelines be able to rely upon a substantial degree of stability in such relationship.

Failure to honor settlements would be a significant source of disruption in the industry. Glib reliance on the public interest of the ultimate consumers on Transco's system should not be allowed to obscure the real-world, practical effects of this decision on the interest of all consumers—especially when the comparative need factor is as attenuated as it is in this context. Failure to encourage settlements and to encourage proper supply management and storage development will have far greater impact on even Transco's customers than the transitory effect of disposition of this gas. The Commission's decision was in the public interest in the broadest sense.

D. The Commission Is Not Bound to Implement an "Obligation of Continued Service."

NYPSC (Br., p. 9), AGD (Br., p. 5) and Transco (Br., p. 11) all rely upon the alleged obligation of continued service. However, the cases cited do not support a presumption favoring continued service but only recognize the statutory requirement to seek abandonment.

Sunray Mid-Continent Oil Co. v. *F. P. C.*, 364 U. S. 137 (1960) has very limited relevance to this case. There, this Court simply held that the Commission has power to issue an unlimited, as opposed to a limited, term certificate. The Court simply noted that the integrity of a private contract would not be impaired because of the obligation to continue service beyond its term unless the producer could prove abandonment; 364 U. S. 154-56. That case held nothing about the standards to govern under Section 7(b) nor did it involve a Commission-approved settlement.

Michigan Consolidated Gas Co. v. *F. P. C.*, 283 F. 2d 204, 214 (D. C. Cir.), *cert. den.* 364 U. S. 913 (1960), was an abandonment case. However, in the passage cited by NYPSC (Br., p. 9), the Court merely holds that the party seeking abandonment must present reasons for the abandonment, and cannot rely simply on its own whims. Adequate reasons for this abandonment were set forth in Opinion No. 655 and, hence, the requirements of that passage are satisfied. Furthermore, *Michigan Consolidated* was a case in which a *pipeline* rather than a *producer* sought abandonment and in which abandonment of service to the regulated market was sought in order to serve the unregulated market. In that situation, quite different weight would be accorded the notion of continuing service.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX B

is Commonwealth Edison, which used substantial quantities of gas for boiler fuel and turbine peaking at points outside Chicago. Sales to Commonwealth Edison by NI Gas for the eight month period ending August 1971 totalled about 23,100 MMcf including off-peak sales of about 17,000 MMcf (Ex. 14). No interruptible gas was sold to Commonwealth Edison by NI Gas in 1971. Approximately 190 customers seeking more than 200 Mcf/d were on a waiting list at the time of the hearing and represented demand for more than 30,000 MMcf annually. If it receives authority to terminate firm seasonal sales totalling about 37,000 MMcf annually to some 200 customers, it will provide new service only to firm, year-round customers after 1972—primarily residential, commercial and small industrial customers. It is attaching new residential customers at the rate of 45,000 units annually.

NI Gas has developed extensive underground storage which its witness indicated exceeds the storage capacity of most pipeline companies.[1] While its prior purchase load factor was estimated at between 93%-95%, it expects to take gas in the future at the highest load factor possible to fill this storage capacity. Summer takes by NI Gas in the future will not be sold as firm seasonal or interruptible sales but will be injected in storage, which storage will enable it to serve its present customers and the 45,000 new residential units annually it expects to attach. Firm customers, regardless of size, are not required

1. This storage program has permitted NI Gas, through a current daily storage withdrawal capacity in excess of 1,300 MMcf/d, to provide up to 32% of its needs on a peak day; 15.9% of NI Gas' 1970-1971 winter capacity on peak days was from its own storage.

to have alternate facilities for burning other fuel. Assuming (1) continued attachment of 45,000 residential units annually, (2) restriction against attaching customers with use of over 200 Mcf/d, and (3) no tariff relief for firm and peak sales, it would have difficulty meeting all needs during severe weather conditions after the 1971-1972 winter season. Under an arrangement with Natural it permanently relinquished 50,000 Mcf/d of winter service gas in exchange for additional summertime takes which it could use for its own storage facilities. This will result in a more effective use of its storage. It projects that a substantial amount of its 10,000 MMcf share of La Gloria gas would be used for storage.

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NI Gas's long-range concern is this lack of safety margin for the severe winter season—i.e. occurring six or seven times a century—commencing possibly in 1972-1973. If a severe winter should occur in 1972-1973 it would not have sufficient gas reserves for the following year. It principal present problem therefore, is its inability to purchase gas from its suppliers to fill its storage facilities to provide a safety margin or to purchase increased supplies, particularly within existing contract demand, to meet what it considers is its reasonable growth needs.

Peoples Gas Light and Coke Company,[1] the parent of Natural and its second largest customer, serves the city of Chicago. Its share of the La Gloria gas is about 8,270 MMcf annually. Peoples has been unable to obtain a sufficient supply of gas from its subsidiary to meet its total requests for additional service and has restricted new attachments pursuant to a plan filed with the Illinois Commerce Commission and approved by that Commission on December 16, 1970 (Ex. 11). Paragraph 9 of Exhibit 11 shows that during the past eight years Peoples,

1. Testimony of Peoples' operations and requirements was supplied by Natural's witness in that Peoples presented no witness of its own.

which represents its firm year round space heaing growth in terms of equivalents (each "equivalent" equals gas used for space heating of a single family dwelling grew as follows (p. 9):

Year Ending September 30	Heating Load Added in "Equivalents"
1963	52,110
1964	49,434
1965	53,805
1966	53,807
1967	57,288
1968	57,556
1969	65,748
1970	82,000 (Est.)

It estimated its 1971 attachments as 33,000 equivalents. As of September 1971 its waiting list totalled about 291,000 equivalents, broken down into about 14,000 residential applications (138,000 equivalents), 2,000 commercial (116,000 equivalents) and 800 industrial (37,000 equivalents).[1] Under a tariff effective May 4, 1970, Peoples required prospective customers to apply 12 months in advance, with the right of Peoples' to delay complying with the application depending on availability of gas. Under its tariff provision to be effective as of September 1, 1972, restrictions will be placed on year-round firm and off-peak service. Allocation of additional service will first go to central space heating, whether for residences or industries, industrial processing, fume abatement and other applications where gas is the only practicable form of energy; and then all other users. Within these categories size is the determinative factor (Ex. 13). No limitations were placed on the attachment of addi-

1. According to Natural's brief, despite releases of over 8,000 applicants (those attached plus those that allegedly tired of waiting) Peoples' October 26, 1971, waiting list included almost 9,000 residential applications with 134,000 equivalents. For the nine-month period ending September 28, 1971, it had 8,089 releases from its waiting list.

tional load for cooking, clothes drying, air conditioning and non-space heating. Sales to Commonwealth Edison for boiler fuel were about 41,000 MMcf in 1970, and Commonwealth Edison will continue to receive service under a temperature control service which reduces service only when gas is needed on cold days to supply other customers. Commonwealth Edison's sales represented a substantial increase from previous years' sales and were largely off-peak summer gas volumes. Other industrial customers are also controlled by temperature control service (Ex. 12).

Air pollution standards in the City of Chicago are controlled by the Chicago Municipal Code as amended in 1970 which limits particulate and sulphur emissions. (Ex. 4) Reduction in the sulphur content of fuel burned for space heating, industrial use, and electric generation in the 1970 regulations require, *inter alia*, that no more than 1% sulphur fuel can be used for any purpose for new or existing facilities after September 1,

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Brooklyn Union's main difficulty is literally running out of supplies in a design winter equalling 1933-1934—one of the worst of the century. Although it has sufficient reserves during a design winter for several days peak service, when its peaking supplies are depleted it would be unable to refill them from pipeline supplies. Transco has curtailed it 12% during September 1971 and has projected 3% to 4% winter curtailment through April 1972. Another of its suppliers has curtailed one of its winter storage service by 3%, but this represents a small decrease compared to Transco's. Brooklyn Union has prohibited any additional sales exceeding 2 Mcf/hour to firm customers (which averages between 14 and 16 Mcf/d) and has not accepted any application for industrial customers since some time in 1970. Service has been refused over 300 customers requesting service in excess of 2 Mcf/hour and 197 industrial customers.

It is still attaching some customers under its temperature control service where applications were pending and construction had commenced when it stopped accepting applications. Its temperature control service requires customers to shift to alternate fuels on colder days so as to make more gas available for other residential units (primarily single families) not in a position to use other fuels. During the first nine months of 1971 it added 1,344 new customers and furnished 4,547 existing customer's space heating gas (about 1,200 MMcf annually) (Ex. 16). According to the witness, however, Brooklyn Union is not growing and has the same number of customers today as it did 10 years ago. Interruptible sales totalling 10,000 MMcf for 1971 to the date of the hearing were made by it, about 1,000 MMcf being sold in September 1971 at about the same time that Transco was imposing mandatory curtailment to fill storage. Brooklyn Union's position is that it takes what gas is offered because if it does not the gas will be "burned under the boiler some place else." Transco could not inject the gas into storage, and had no additional storage space available, so Brooklyn Union bought the gas and made interruptible sales which generate revenue from facilities that are costed at a fixed level. Such sales lower the overall average cost for each unit sold within contract demand. Sales of interruptible gas by a company like Brooklyn Union at a time when Transco is curtailing sales, therefore, occur when firm customer's desires are met and Transco's limited storage facilities are unable to

fuel. While much of the stored gas would be used for winter heating uses of residential customers served by Natural or its distributors, the fact remains that the La Gloria gas will not replace gas previously bought and distributed by them. Thus, whereas Transco has a cut-back from levels of previous purchases

by its customers, Natural's "cut-back" is essentially incremental in nature and is previously a limitation on growth.[1]

Nor does a comparison of the growth limitations disclose as serious a situation on Natural's system as on Transco's. While most of the companies involved are expanding sales and each has sold more gas in 1971 than in the preceding year, the rate of growth has varied. NI Gas for example has been growing at a rate of 8% to 9% annually and its projected deficiencies of 43,000 MMcf in 1971 and 50,000 MMcf in 1972 are essentially the amounts of gas required to continue growth at this level. While NI Gas's tariff permits attachments of new customers of up to 200 Mcf/d without a requirement of temperature control and Peoples' tariff permits a range of attachments on a priority favoring residential space heating, Brooklyn Union's tariff restricts any sales to customers exceeding 2 Mcf/hour (averaging 14-16 Mcf/d). Peoples has no limitation on attachments of additional loads for cooking, clothes drying, air conditioning or other residential non-space heating needs. Brooklyn Union under its tariff added 1,344 new customers and furnished 4,547 existing customer space heating gas (1,200 MMcf annually of increased sales), but it has had no increase in the total number of customers in 10 years. NI Gas has, on the other hand, added 54,000 residential customers in 1971 and anticipated similar annual growth in the future (a 1% growth factor for NI Gas represents between 4,000 and 5,000 MMcf annually of increased sales). Peoples added 81,000 equivalents in 1970 and estimated its growth at 33,000 equivalents for 1971. Thus, NI Gas alone has added eight times the number of residential customers than Brooklyn Union, and even if adjustment is made for the difference in territory served by the utilities, it was substantially more than Brooklyn Union. The conclusion is inescapable that Brooklyn Union is more severely limiting attach-

1. Through 1970 Natural's load factor did not exceed 85%, although in 1971 it exceeded 91%. Natural added substantial contract demand in December 1970.

ments of new customers than NI Gas and Peoples and is making substantially fewer attachments under its program than is either NI Gas or Peoples.

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Neither Brooklyn Union, Peoples nor NI Gas, however, is in imminent danger of being unable to provide service to existing customers. Brooklyn Union's concern is the occurrence of that hypothetical winter following a design winter where its storage facilities would be low and could not be refilled from pipeline gas to meet customer needs. Brooklyn Union's design year is based upon the most severe winter of this century, and NI Gas on a design year which has occurred less than seven times in this century. NI Gas could not only meet a normal winter in 1972-1973, but the predicate for its estimates are a continued adding of 45,000 residential customers annually as well as commercial and industrial customers using less than 200 Mcf/d. While there is no question that their margins of safety are being reduced, and will continue to be reduced if they add substantial quantities of new load without purchasing new gas, they are not in imminent danger of running out of gas to serve their existing firm customers' needs. To the extent the dispute as to adverse effect is not based on present flowing gas deficiencies and curtailments but centers on long range projections, the situation will be affected by increased new sales during the intervening years and no finding of serious impairment of service to existing firm customers now can be made as to any of the companies involved.

Evidence was adduced by both the City of Chicago and Consolidated Edison showing the effects on the environment of limiting gas sales in Chicago and New York respectively. Both now have, or shortly can be expected to have, relatively similar pollution abatement laws under the existing Federal Standards and both would obviously benefit by burning gas rather than other fuels with higher sulphur content. Since electric utilities

in and around these cities contribute by far the largest amount of pollutants—estimated in New York's

the reluctant desire of the parties to this case to make a complete record and the obvious lack of adequate evidence as to how priorities of use should be reordered, it is patent that this is not the proper proceeding in which to determine the relative merits of phasing out any particular service or singling out any particular company for separate treatment. As a matter of policy, however, it is in the public interest that any present plans of these pipelines to limit both interruptible, seasonal and firm boiler fuel use on their systems should be encouraged.

The cost to Transco if it should lose La Gloria gas and if it were not replaced would be about $7,000,000. If the gas were replaced by other gas, even substantially higher cost gas, the loss would be less. The dollar savings to Natural if it obtained the gas and it did not have to add facilities, would be about the same as the loss to Transco. On a comparative basis the Examiner concludes that both companies would benefit to the same degree or suffer to the same degree financially depending upon which company receives the 81,000 Mcf/d of La Gloria gas. Both, ultimately, would recover increased costs from their customers.

One of the unspoken reasons that possession of 81,000 Mcf/d of La Gloria gas has been so vigorously contested appears to be its relatively cheap cost.[1] La Gloria gas by today's standards is cheap gas—particularly when compared, for example, to emergency purchases at 35¢/Mcf now being made by Transco in the *Nueces* case. These basic financial considerations point up one of the equitable difficulties in the instant case. Whether belatedly or not, Natural's management in the immediate past has taken those steps necessary to increase storage, has managed its storage

1. Both Natural and Transco argue that this amount of gas is not of great importance to the other; it represents, as Staff points out with regard to Transco, only a small percentage of Transco's reserves. The same argument, of course, is pertinent to Natural.

facilities so as to keep them in a reasonable balance, and has made substantial efforts to reorder its priorities to protect its winter residential needs. Transco on the other hand, appears to have grossly miscalculated its flowing gas deficiency and sold gas in the spring and early summer months of 1971 which it should

have injected into storage even, perhaps especially, to the extent that this required the development of new storage fields. Transco also had no plans at the time of the hearing to add storage so as to reduce its customers' sales of interruptible gas during 1972 and 1973. Nor can one ignore the fact that it was the refusal of South Texas to deliver approximately 100,000 Mcf/d of gas under its contract which aggravated Transco's flowing gas problem. An investigation of the arrangements between South Texas, Nueces, and Transco is the subject of another Commission proceeding and were not pressed in the instant case, but the Examiner notes that while Transco has been seeking certificates for emergency purchases from Nueces it is mainly Transco's customers which oppose the South Texas abandonment application. When all is said and done, it is unfortunate that the customers of the pipeline which has shown less ability to cope with the consequences of a gas shortage should benefit monetarily from availability of cheaper gas while the customers of the pipeline which has shown greater foresight are denied such benefits. The Examiner concludes however, that despite this seeming inequity, the Natural Gas Act was designed to protect the ultimate consumer receiving the gas service—which in this case is Transco's customers, and this includes protection against the errors of the transmission company. Compare *United Gas Pipe Line Co.*, 3 FPC 3 (1942), where the distributor and pipeline erred in projecting the completion date for alternative facilities and could not reach agreement on an extension of service. An abandonment of service which would have affected the customers was not permitted during the interim period of time. See also the Commis-

sion's October 22, 1971, order in the *Nueces* case *supra*. In these circumstances, the Examiner believes that the equitable considerations favoring Natural are not of a nature to override the adverse effect to Transco's customers of the loss of the La Gloria Gas.

On the basis of all of the evidence of record, the Examiner concludes that Transco and its customers have a continuing need for the 81,000 Mcf/d of La Gloria gas not being sold them by the producers; that Transco's curtailment and possible effect on existing customers is more substantial than the effect of a decrease in purchases of primarily valley gas by Natural's customers; that Natural has failed to show that the adverse effect on it and its customers as compared to Transco and its customers permit abandonment by the producers of this sale to Transco; and that the applications seeking to abandon such sales must be denied.